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No. 84-1604

In the Supreme Court of the United States

OCTOBER TERM, 1984

JUSTO GUZMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the defense preparation period provision of the Speedy Trial Act, 18 U.S.C. 3161(c)(2), prohibits commencement of trial within 30 days of a defendant's arraignment on a superseding indictment even as to a substantive offense count in which the only change effected by the new indictment is the deletion of the names of two co-defendants.

1. On March 28, 1984, an indictment was returned by the grand jury in the United States District Court for the Eastern District of New York charging petitioner and two others with conspiring on March 21 and 22, 1984, to distribute cocaine, in violation of 21 U.S.C. 846, and possession of one and one-half kilograms of cocaine, in violation of 21 U.S.C. 841(a)(1). Trial commenced on June 4, 1984. During the prosecutor's opening statement, he alleged that petitioner was a member of the Victor Crespo cocaine smuggling organization. The following day, the district court declared

a mistrial on the ground that the prosecutor could not prove this allegation with competent evidence. Pet. App. A3.

Following the mistrial the prosecution secured a superseding indictment that expanded the duration of the conspiracy charged in Count I to encompass 1982 and 1983. This change was made to avert any possible objection to reception in evidence of a ledger kept by petitioner that recorded drug transactions dating back to 1982. The superseding indictment did not change the possessory offense charged in Count II of the original indictment in any respect except that the names of petitioner's two co-defendants were dropped.

Denying the request of defense counsel for a continuance, the district court commenced a jury trial on the superseding indictment on June 7, 1984. Petitioner was convicted on both the conspiracy and the possession counts.[1] He was sentenced to consecutive terms of 15 years' imprisonment and to cumulative fines of $25,000 on each count. A special parole term of life was imposed on the substantive charge. The court of appeals reversed the conspiracy count but affirmed the substantive count.

2. The evidence at trial showed that DEA agents who had been watching petitioner, a suspected cocaine trafficker, saw him engage in what appeared to be a narcotics transaction with his co-defendants, Seiichi Kawai and Dora Susana Forero. Afterwards, the agents stopped Kawai and Forero. Forero begged Kawai in Spanish to give the agents an innocent explanation for the large amount of cash ($240,000) that they were carrying. After the agents discovered the cash, petitioner, Forero and Kawai were arrested.

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[1]The jury was unable to reach a verdict with respect to petitioner's co-defendants. They were subsequently tried again and convicted.

Thereafter, petitioner's apartment was searched pursuant to a warrant and one and one-half kilograms of cocaine was found, along with narcotics paraphernalia and a money counter. The agents also searched a second apartment frequented by petitioner and found, inter alia, a large metal safe. Subsequently, at the DEA office, petitioner opened the safe for the agents. Inside was a ledger recording cocaine transactions spanning a two-year period that aggregated over $35 million.

3. The court of appeals reversed petitioner's conspiracy conviction on Speedy Trial Act grounds, but affirmed his conviction for possession of cocaine. The court held that Section 3161(c)(2) of the Speedy Trial Act does not guarantee a defendant a second 30-day defense preparation period following the return of a superseding indictment.[2] Instead, the court held, the district court has discretion to grant or refuse a continuance following a superseding indictment. Moreover, the court reasoned (Pet. App. A8):

> Both indictments charged [petitioner] with the March 22 possession of one and one-half kilograms of cocaine, a charge amply supported by the evidence, which included the cocaine seized from [petitioner's] apartment. As the deletion of co-defendants Kawai and Forero from the possession count in the second indictment changed neither the prosecution's case nor conceivable defenses by [petitioner,] the defendant could not possibly have been prejudiced because required to proceed to trial on this charge. Finally, because the great bulk of the evidence adduced at trial,

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[2] 18 U.S.C. 3161(c)(2) provides:

> Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

with the exception discussed below, was relevant and admissible as to Count II, [petitioner] could not have been prejudiced by the improper joinder of the conspiracy count.

4. The court below correctly held that Section 3161(c)(2) of the Speedy Trial Act does not guarantee a new 30-day preparation period following the return of a superseding indictment. This issue, however, is now pending before the Court in *United States* v. *Rojas-Contreras*, cert. granted, No. 84-1023 (Feb. 19, 1985). We have sent petitioner a copy of our brief in *Rojas-Contreras*, which addresses the application of the trial preparation provision to superseding indictments. Although the Court may wish to hold this petition pending disposition of *Rojas-Contreras*, we submit that such action is not necessary.[3]

This case is factually distinguishable from *Rojas-Contreras*. In *Rojas-Contreras*, the original indictment charged the defendant with illegal entry into the United States having been convicted on or about December 17, 1981, of the same offense. Thereafter, a superseding indictment was returned, which changed the date of Rojas-Contreras's prior conviction from December 17 to December 7, 1981. Trial began four days later, and Rojas-Contreras was convicted as charged. The Ninth Circuit reversed the conviction, holding that under Section 3161(c)(2), the defendant was entitled to a new 30-day preparation period following his arraignment on the superseding indictment.

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[3]After granting review in *Rojas-Contreras*, this Court denied certiorari in *Rush* v. *United States*, No. 84-685 (Feb. 25, 1985), and *Yamanis* v. *United States*, No. 84-1261 (May 13, 1985), each of which raised a related issue, namely, whether a new defense preparation period is required following substitution of counsel.

Thus, in *Rojas-Contreras*, there was technically a change — albeit an insignificant one — in the charge on which the defendant was brought to trial. In contrast, here petitioner faced the identical substantive charge before and after the superseding indictment was returned. The only change in Count II in the superseding indictment was the deletion of Kawai and Forero as co-defendants. But this deletion did not affect the charge against petitioner in any way. It is therefore unclear whether petitioner's conviction on the possession count would have been reversed in the Ninth Circuit. In any event, petitioner does not suggest any reason why the policy of the Speedy Trial Act supports a reversal of his conviction on the possession count. There is no claim that the return of the superseding indictment in any way prevented him from being ready for trial on the appointed date. Indeed, any such claim would be frivolous given that petitioner had already once commenced trial on the possession count.

Even if this Court were to hold in *Rojas-Contreras* that *every* superseding indictment automatically triggers a new defense preparation period — a result rejected to date by the First, Second, Fifth, Sixth and Seventh Circuits[4] — reversal would not be justified here. We argue in our brief in *Rojas-Contreras* (at 39-47) that, contrary to the apparent view of the Ninth Circuit, violations of Section 3161(c)(2) can be harmless. See Fed. R. Crim. P. 52(a). As the court below found (Pet. App. A8), petitioner "could not possibly have been prejudiced because required to proceed to trial" on the possession offense fewer than 30 days after the superseding indictment was returned. His defense to the possession charge was not altered by the new indictment, and the

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[4]In addition to the cases cited in our brief in *Rojas-Contreras* (at 9 n.6), see *United States* v. *Gallo*, No. 83-3288 (6th Cir. May 29, 1985), slip op. 29-34.

evidence of his guilt was overwhelming — the cocaine was found in his apartment.[5] Petitioner has wholly failed to show how an additional 30 days of preparation time could have altered his prospects for an acquittal. Accordingly, whether or not Section 3161(c)(2) was violated here, petitioner's conviction must stand.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

JUNE 1985

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[5]Petitioner does not take issue with the court of appeals' conclusion that he was in no respect prejudiced by the district court's failure to continue his trial on the possession count. Petitioner does quarrel (Pet. 5 & n.3) with the court of appeals' separate conclusion (Pet. App. A8) that petitioner could not have been prejudiced by the joinder for trial of the possession count with the conspiracy count, as to which the court of appeals concluded a continuance should have been granted. Petitioner criticizes the court of appeals' assessment of the admissibility of certain evidence — the drug ledger and certain post arrest statements by petitioner — as to the possession offense. But even if this evidence had no proper bearing on the possession offense — a fact-bound point on which there is no reason to review the court of appeals' determination —the court of appeals' ultimate conclusion would stand. The court's conclusion was simply that, "[i]n light of the overwhelming evidence supporting [petitioner's] conviction for possession" petitioner was not prejudiced by any misjoinder of counts or the admission of evidence relating only to the conspiracy charge (Pet. App. A10). Petitioner's claim (Pet. 5) that "crucial evidence was admitted solely because of the improper joinder of the conspiracy count" simply ignores the most important evidence cited by the court of appeals in support of its ruling — the 1.5 kilograms of cocaine found in a warrant search of petitioner's apartment (see Pet. App. A5, A10).